Supreme Court, U. S.
FILED
FEB 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

REPLY TO BRIEF OF HOME FEDERAL SAVINGS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Brief in Opposition filed by Home Federal Savings points up the appropriateness of the Court taking this case in order to decide the issues presented. The question as to whether voluntary payment to the putative class representa-

tive by a defendant can moot a class action and thereby insulate from appellate review the trial court's order denying class status is clearly and simply presented—and, as set forth below, Respondent Home's argument makes that very point.*

I.

As to the argument that Petitioners concern themselves with mere dicta in the opinion below, Respondent Home's brief assists Petitioners' argument. Respondent Home argues (pp. 12-13) that, once the district court has denied class status, only an individual action is then involved, and, since "[p]laintiffs in this case do not represent anyone else," the defendants are therefore entitled to pay off the named plaintiffs and moot the entire case, thereby foreclosing appellate review of any class action ruling. But that contention points up the sharpness of the issue and emphasizes the fact that Petitioners do not rely on dicta, but are affected by the square holding of the case. It is Petitioners' position that they do represent someone else—the unnamed class members—and that the courts do have jurisdiction to determine whether they do or do not represent that class. This, at the very least, is the issue remaining at large between the parties. It is this issue which the Seventh Circuit's opinion specifically and directly held it had no jurisdiction to decide—hardly a matter of dicta.

Thus, seemingly agreeing with Petitioners that the Seventh Circuit was wrong, Respondent Home at p. 12 states:

> "The District Court did not 'duly certify' any class in this case. Thus, *this case* is moot even if the Seventh

* Respondents Bell Federal Savings and Uptown Federal Savings have not responded to the Petition.

> Circuit's dicta might be wrong as to cases where there has been no prior ruling on the class action issue." (emphasis in original)

Then, after quoting from this Court's opinion in *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), Respondent at p. 13 goes on to assert:

> "By contrast, Plaintiffs in this case do not represent anyone else. A decision denying class status and dismissing class allegations totally strips the litigation of its class action character."

If the district court's denial of class status were correct, then Respondent's conclusion may be valid. Having received all the relief as to which they are entitled, Petitioners can certainly understand the position that there then remains no case or controversy. But if the district court was in error, then Respondent's conclusion is incorrect. Plaintiffs, in that event, do represent a class whose members have live interests still before the court, notwithstanding the satisfaction of the named plaintiffs' individual $12 claims.

The threshold question presented to this Court is whether the district court's denial of class status can be immunized from judicial review by the simple voluntary action of the defendants in paying off the named plaintiffs before a reviewing court has the opportunity to rule. The Court of Appeals held that the defendants could do this, and accordingly dismissed the appeal. This is the square holding of the court below. In no sense is it dicta and its effect is to do away with the class action in the Circuit.

Further, the Seventh Circuit certainly *thought* that the alleged rule of law embodied in Proposition 2 (which Home urges is mere dicta) was the very foundation for its holding of mootness. Surely Proposition 2 and its companion propo-

sitions enumerated by the court below are the carefully considered products of that court's reasoning, and not simply casual comments thoughtlessly tossed out in passing. Proposition 2, whether characterized as dicta or holding, will have (and already is having) a fatally chilling effect upon class actions pending in the Seventh Circuit, as argued at pp. 14-15 of the Petition for Certiorari. Whether or not Home believes Proposition 2 to be dicta, the district courts consider it to be the law in the Seventh Circuit.

II.

Assuming, *arguendo,* that all that this Respondent asserts is correct, there is presented a case in which the named plaintiffs are not entitled to (i) injunctive relief (the practices complained of having been corrected), (ii) money damages (the defendants having tendered all the monetary relief to which the individual plaintiffs are entitled), and (iii) attorneys' fees (the law does not permit such reimbursement). Thus, the only matters plainly remaining at large are the class action issues—questions which, according to the Seventh Circuit, neither the district court nor the appellate court has jurisdiction to decide. A simpler, more direct presentation of the issue can hardly be imagined.

Respondent Home argues as though the issue before the Court is whether plaintiffs' individual damage claims are moot (Home Br. p. 9). The central issue, however, is whether, when a defendant voluntarily attempts tender of those individual damages, the Court of Appeals is deprived of jurisdiction to review denials of class status.

III.

Respondent Home Federal would have this Court believe that the Seventh Circuit's determination that it had no jurisdiction to decide the class action questions was based upon certain "admissions" allegedly made by plaintiffs during the course of proceedings in the trial court, rather than upon the grounds actually set forth in the opinion below. In particular, Respondent quotes (at p. 7) the following statement made by plaintiffs: "Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs . . . ." These Petitioners do indeed concede that their *individual* monetary damages are no greater than $12 each. (Petition p. 6). That, however, is not the point at issue.

Respectfully submitted,

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